



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125, and 128

RIN 3245-AH69

Veteran-Owned Small Business and Service-Disabled, Veteran-Owned Small Business — Certification

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) is proposing to amend its regulations to implement a statutory requirement to certify Veteran-Owned Small Business Concerns and Service-Disabled Veteran-Owned Small Business Concerns participating in the Veterans Certification Program.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AH69, by any of the following methods:

1. Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
2. For mail, paper, disk, or CD-ROM submissions: Timothy Green, U.S. Small Business Administration, Office of Veterans Business Development, 409 Third Street SW, 5th Floor, Washington, DC 20416.
3. Hand Delivery/Courier: Timothy Green, U.S. Small Business Administration, Office of Veterans Business Development, 409 Third Street SW, 5th Floor, Washington, DC 20416.

Instructions: SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at

www.regulations.gov, please submit the information to Timothy Green, U.S. Small Business Administration, Office of Veterans Business Development, 409 Third Street SW, 5th Floor, Washington, DC 20416., or send an email to Timothy.green@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Timothy Green, U.S. Small Business Administration, Office of Veterans Business Development, 409 Third Street SW, 5th Floor, Washington, DC 20416; (202) 205-6777; Timothy.green@sba.gov. This phone number may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Small Business Administration (SBA) is seeking input and comments on a proposed rule to establish a certification program for Veteran-Owned Small Businesses (VO SBC) and Service-Disabled Veteran-Owned Small Businesses (SDVO SBC). SBA is planning to amend its regulations to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 128 Stat. 3292 (January 1, 2021) (NDAA 2021).

The Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business Programs, set forth in 38 U.S.C. 8127, authorize Federal contracting officers to restrict competition to eligible VO SBCs and SDVO SBCs for Department of Veterans Affairs (VA) contracts. To be eligible for VA contracts, VO SBCs and SDVO SBCs must be verified by VA's Center for Verification and Evaluation (CVE) in accordance with 38 U.S.C. 8127. There is currently no Government-wide SDVO SBC certification

program, and firms seeking to be awarded SDVO SBC sole source or set-aside contracts with Federal agencies other than the VA, only need to self-certify their status as set forth in section 36 of the Small Business Act, 15 U.S.C. 657f.

NDAA 2021 amended the VO SBC/SDVO SBC requirements to transfer the responsibility for certification of VO SBCs and SDVO SBCs to SBA as of January 1, 2023 (Transfer Date) and created a certification requirement at SBA for SDVO SBCs seeking sole source and set-aside contracts across the Federal Government. Section 862 also created a one-year grace period after the Transfer Date for businesses currently self-certifying to file an application for SDVO SBC certification with SBA. Self-certified SDVO SBCs that submit an application within the one-year grace period will maintain eligibility until SBA makes a final eligibility decision. With the exception of this grace period, once this rulemaking is finalized, VO SBCs and SDVO SBCs that are not certified by SBA's Veterans Certification Program (Vets Program) will not be eligible to receive sole source or set-aside VO SBC or SDVO SBC awards across the Federal Government.

Firms verified by VA's CVE prior to the Transfer Date will be deemed eligible by SBA during the time that remains in the firm's three-year term of eligibility. To remain certified by SBA after the Transfer Date, those verified firms will be required to meet all conditions of eligibility as described in SBA's revised regulations. With this rulemaking, SBA is also proposing to grant reciprocity to participants in SBA's 8(a) Business Development and Women-Owned Small Business (WOSB) programs that are owned and controlled by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans. Both the 8(a) and WOSB programs require applicants to demonstrate ownership and control to be eligible for certification. The ownership and control requirements for those programs are basically the same as those set forth in this proposed rule for VO SBCs and SDVO SBCs, and the rulemaking would provide an expedited application and

review process for 8(a)/WOSB-certified firms seeking VO SBC/SDVO SBC certification. In such cases, SBA would confirm the identified individual's eligibility as a veteran or service-disabled veteran before granting certification. SBA believes reciprocity between SBA's certification programs would create program administration efficiencies as well as reduced processing time for applicants.

SBA proposes to implement the Veterans Certification Program in a new 13 CFR part 128. As proposed, 13 CFR part 128 would be organized into the following subparts: Subpart A – Provisions of General Applicability, Subpart B - Eligibility Requirements for the Veterans Certification Program, Subpart C - Certification of VO SBC or SDVO SBC Status, Subpart D - Federal Contract Assistance, Subpart E - Protests Concerning VO SBC and SDVO SBCs, Subpart F - Penalties and Retention of Records, and Subpart G - Surplus Personal Property for Veteran-Owned Small Business Programs. SBA's proposed rule is an effort to create a seamless transfer of the VO SBC/SDVO SBC verification function from VA to SBA. To accomplish this task, SBA consolidated existing regulations for the SDVO SBC program at 13 CFR part 125 with VA's CVE verification guidelines at 38 CFR part 74. To further ensure continuity for Vets Program participants during and after the transfer, SBA generally adopted VA's application guidelines, rules on continuing eligibility, program examinations, and program exit procedures at 38 CFR part 74 with few exceptions.

Concurrently, SBA proposes to amend 13 CFR part 125 to remove SDVO SBC regulations in subparts A through F, consisting of §§ 125.11 through 125.100, and include them in 13 CFR part 128. SBA also proposes to amend references to part 125 in SBA's size regulations at 13 CFR part 121.

II. Section-by-Section Analysis

For ease of review, SBA organized proposed part 128's "Section-by-Section Analysis" into subparts and sections. Each section has a citation, heading, and the

section's source citation. The source citations correspond to either 13 CFR part 125 or 38 CFR part 74. Sections with no corresponding regulation are marked "New."

Subpart A - Provisions of General Applicability

Section 128.100 What is the purpose of this part? (New)

Proposed § 128.100 would add a general purpose section for the Veterans Certification Program with statutory authority for contractual assistance to VO SBCs and SDVO SBCs. There was no equivalent section in previous SDVO regulations at part 125 and SBA is proposing this amendment to match the general applicability subparts found in SBA's other certification programs.

Section 128.101 What type of assistance is available under this part? (New)

Given the unique nature of VA's contractual assistance program, SBA believes it is important to distinguish the differences in contractual assistance available between VO SBC/SDVO SBC contracts at VA and SDVO SBC contracts across the rest of the Federal Government. Accordingly, this proposed amendment adds the two types of assistance available to participants in the Veterans Certification Program. There was no equivalent section in previous SDVO SBC regulations in part 125.

Section 128.102 What definitions are important in the Veterans Certification Program? (Former § 125.11 and 38 CFR 74.1)

Section 128.102 as proposed, consolidates the definitions sections of 13 CFR 125.11 and 38 CFR 74.1. In general, § 128.102 would adopt VA's existing definitions which applied to the verification process, remove duplicate definitions between VA and SBA regulations, remove VA definitions that referenced SBA's definitions at § 125.11, and eliminate definitions that are no longer applicable to the SBA's new certification program. Section 125.11 currently includes a definition of VO SBC and SDVO SBC. SBA is proposing to move these definitions into the eligibility section at § 128.200 in subpart B.

Subpart B - Eligibility Requirements for the Veterans Certification Program

Section 128.200 What are the requirements a concern must meet to qualify as a VO SBC or SDVO SBC? (New)

As proposed, this section would reflect the separate and distinct eligibility requirements for certification as a VO SBC or SDVO SBC. Proposed § 128.200 would incorporate the definitions of VO SBC and SDVO SBC previously included as definitions in § 125.11. Proposed § 128.200 would also expand how SBA currently defines a VO SBC/SDVO SBC. Previously, only VO SBC/SDVO SBCs that were small in their primary North American Industry Classification System (NAICS) code were considered eligible. This proposed amendment would allow an entity to apply for certification if the concern, with its affiliates, meets the size standard corresponding to any NAICS code under which it currently conducts business activities. Given that “currently conducts business activities” is not defined in regulations, SBA is seeking comment on how best to define this term for the purposes of certification. For set aside or sole source VO or SDVO contracts, certified firms would still be required to be small within the size standard corresponding to the NAICS code assigned to the contract. This proposed amendment is also reflected in the definitions section at § 128.102 and application procedures at § 128.303.

Pursuant to NDAA 2021, the proposed section would add paragraph (c)(1) to require participants to certify with SBA and paragraph (c)(2) to clarify that certification is only required for sole source and set-aside awards. Firms that do not apply for certification in the Vets Program may continue to self-certify their status, receive contract awards outside the Vets Program through open competition or other types of set-asides, and count toward an agency's goals. For example, a self-certified SDVO SBC may be awarded a small business set-aside and the agency may count the award as both a small business and SDVO SBC toward the agency's goals. For those purposes only, contracting

officers would be able to accept self-certifications without requiring them to verify any documentation.

Section 128.201 What other eligibility requirements apply for individuals or businesses?

(Former 38 CFR 74.2(b) through (f))

Section 128.201 as proposed, would add conditions of eligibility for certification which are incorporated from additional eligibility requirements for verification by CVE at § 74.2(b) through (f). This rulemaking proposes to eliminate consideration of whether an individual who is currently incarcerated, or on parole or probation owns or controls an applicant concern in determining whether the applicant possesses good character and qualifies as a VO SBC or SDVO SBC. SBA believes that its role should be limited to determining whether an applicant is owned and controlled by one or more veterans or service-disabled veterans. Whether an individual involved with the applicant is currently incarcerated, or on parole or probation is a responsibility issue, and whether a concern possesses the responsibility to perform a contract is a contract specific issue, not an underlying eligibility issue. SBA views the issues as to whether the concern has the necessary integrity to perform a contract in the same way as it does questions relating to whether the concern has the necessary financial wherewithal, capacity or tenacity, and perseverance to perform a contract. All are responsibility issues determined by a contracting officer relating to a specific contract. SBA's certification as to whether an applicant is owned and controlled by one or more veterans or service-disabled veterans should be limited to consideration of an individual's status as a veteran or service-disabled veteran, the ownership and control of the applicant, and ensuring that the applicant qualifies as small under the size standard corresponding to any work that it currently performs and would continue to seek to perform through the VO or SDVO small business programs. Thus, as proposed, the good character review would be limited to ensuring that an applicant or principal was not debarred or suspended. SBA also

considered retaining a modified good character requirement that could render an applicant ineligible if there were outstanding issues relating to moral turpitude or business integrity, but again concluded that that would also be more appropriately considered by a contracting officer as an issue of responsibility. SBA specifically requests comments on this issue.

The regulations at 38 CFR 74.2(a) currently include ownership and control as a condition of eligibility. As proposed, § 128.200 already requires ownership and control as an eligibility requirement, so it was not included in this section. While drafting this proposed section, SBA considered adopting additional eligibility requirements found in other SBA programs such as 8(a) additional eligibility requirements in § 124.108. However, for continuity purposes, SBA is proposing to adopt the additional eligibility requirements directly from 38 CFR part 74.

Section 128.202 Who does SBA consider to own a Veteran-Owned or Service-Disabled Veteran-Owned SBC? (Former § 125.12)

While SBA's existing ownership requirements at § 125.12 apply to both VO SBC and SDVO SBCs, § 125.12 refers only to service-disabled veterans. This section as proposed, would add a reference to veterans in the following section: § 128.202(a) through (g), which correspond to current regulations at § 125.12(a) through (g).

Proposed § 128.202(f) would incorporate 38 CFR 74.3(b) requiring participants to notify SBA of any change of ownership. In § 125.12(f), SBA addresses change of ownership but does not require notification to the agency. Proposed § 128.202(f) would require participants to notify SBA of a change of ownership and attest to continued eligibility in accordance with proposed § 128.307. There are no other proposed amendments to SBA's existing ownership regulations at § 125.12. SBA is also requesting comment on this section as proposed, including any suggested amendments to VO/SDVO ownership; for example, whether the proposed regulations at § 128.202 should more

closely match the WOSB/Economically Disadvantaged WOSB (EDWOSB) ownership regulations found at 13 CFR 127.201.

Section 128.203 Who does SBA consider to control a Veteran-Owned or Service-Disabled Veteran-Owned SBC? (Former § 125.13)

Proposed § 128.203 would include SBA's existing control requirements at § 125.13 and revise the section to add reference to veterans. SBA previously administered only the SDVO SBC self-certification program and § 125.13 did not specifically reference VOSB requirements. To be verified by VA and subsequently certified by SBA on the Transfer Date, VO SBCs are required to meet the same control requirements as SDVO SBCs per 38 CFR 74.4. There are no other proposed amendments to SBA's existing control regulations at § 125.133. As proposed, SBA control regulations do not address franchise, license, or distributor agreements. SBA is seeking comment as to whether these types of agreements should be addressed within proposed § 128.203. For example, should SBA take a similar approach to the agency's loan assistance regulations in § 121.301(f)(5)?

Current SBA regulations at § 125.13(i), (k), and (l) list several "rebuttable presumptions" of control by a non-veteran. As proposed, SBA is adopting those existing regulations in full but is soliciting comment as to whether those rebuttable presumptions should be viewed merely as factors of control by non-veterans rather than conditions of ineligibility that an applicant must rebut. Additionally, SBA is requesting comment on whether any of the rebuttable presumptions as proposed should be amended. SBA is also requesting comment on this section as proposed including any suggested amendments to VO SBC/SDVO SBC control. For example, whether the proposed regulations at § 128.203 should more closely match the WOSB/EDWOSB control regulations found at 13 CFR 127.202.

Section 128.204 What size standards apply to VO SBC and SDVO SBCs? (Former § 125.14)

Proposed § 128.204 would include SBA's existing size requirements at § 125.14 and revise the section to incorporate VO SBCs. SBA previously administered only the SDVO SBC self-certification program, so § 125.14 did not specifically reference VO SBC requirements. To be verified by VA and subsequently certified by SBA on the Transfer Date, VO SBCs are required to meet the same size requirements as SDVO SBCs. As such, this section would also be amended to reflect the VO SBCs.

Subpart C - Certification of VO SBC or SDVO SBC Status

Subpart C as proposed, would adopt VA's existing application and oversight guidelines at 38 CFR 74.10 through 74.22 and incorporate these sections into SBA certification for VO SBC and SDVO SBCs. References to VA's application, the CVE program, the term "verification," the Vendor Information Pages (VIP) database, and VA forms would be removed throughout proposed §§ 128.300 through 128.310 and replaced where relevant with SBA, certification, and references to SBA's database and online application system.

VA's Records Management section (38 CFR 74.25 through 74.29) would not be incorporated into subpart C, as these provisions are no longer applicable to this program. SBA will seek Office of Management and Budget (OMB) approval for the information collection required for this program. SBA does not anticipate collecting additional information that was not previously collected by VA.

Section 128.300 How is a concern certified as a VO SBC or SDVO SBC? (Former § 74.2)

Proposed § 128.300 would include VA's eligibility requirements at 38 CFR 74.2(a), with proposed revisions to remove references to VA and to reflect SBA's certification program. SBA's proposed rule would also grant certification based on an

applicant's participation in SBA's 8(a) Business Development and WOSB/EDWOSB programs. SBA anticipates that many participants may seek multiple certifications and believes reciprocity between SBA's certification programs will create program administration efficiencies as well as reduce the processing time for applicants. In granting certification for these programs, SBA reviews ownership and control of the applicant to determine eligibility. The ownership and control requirements that apply to disadvantaged individuals for 8(a) certification and those applying to women for WOSB/EDWOSB certification are basically the same as those applying to veterans and service-disabled veterans for the Veterans Certification Program. An applicant would be required to certify that there are no material changes in its ownership or control since its 8(a) or WOSB certification, and SBA would then accept its previous determinations that the identified individual owned and controlled the VO SBC/SDVO SBC applicant. In such cases, SBA would confirm the identified individual's eligibility as a veteran or service-disabled veteran.

There is likelihood that 8(a) or WOSB firms granted reciprocity will have remaining "time in program" on their existing certifications that would not align with the proposed three-year eligibility period for this Vets Program. In these instances, SBA would align recertification based on the firm's existing certification eligibility period. As an example, a WOSB firm certified in 2022 would be required to reapply for WOSB certification at the end of their three-year eligibility period in 2025. If granted reciprocity into the proposed Vets Program in 2023, that firm would have two remaining years of eligibility. In 2025, the firm would apply for recertification to WOSB and then if eligible, would be granted a three-year eligibility period for both programs. That firm would then be required to update their status in the Veterans Certification Program to reflect recertification by WOSB. SBA is seeking comment on this approach to recertification

and whether SBA should amend 8(a) regulations at part 124 and WOSB/EDWOSB regulations at 13 CFR part 127 to reflect reciprocity between programs.

Section 128.301 Where must an application be filed? (Former § 74.10)

Proposed § 128.301 would include VA's requirements at 38 CFR 74.10 for application to CVE, propose revisions to remove references to VA, and reflect that an applicant must apply to SBA for certification after the rule is effective. At the time of this proposed rule, SBA has not announced its application platform or certification database for the Vets Program. Accordingly, the proposed amendments have general references to this technology. When finalized, the rule will include instructions to apply online and access the certification database.

Section 128.302 How does SBA process applications for certification? (Former § 74.11)

Proposed § 128.302 would include VA's guidelines for application processing by CVE at 38 CFR 74.11, propose revisions to remove references to VA, and reflect SBA's certification program. As proposed, this section would remove specific processing guidelines in § 128.302(a) as SBA has not established the policies and procedures for application processing at this time. SBA also proposes to add an additional sentence at the end of § 128.302(e) to establish SBA's authority to decertify a firm in the event that the firm failed to inform SBA of any changed circumstance in accordance with § 128.306. The regulation at 38 CFR 74.11(e)(1), which requires participants to notify VA of bankruptcy details within 30 days, would be incorporated into §§ 128.302(e) and 128.307 to require participants to notify SBA in the event of a bankruptcy filing.

Section 128.303 What must a concern submit to apply for VO SBC or SDVO SBC certification? (Former § 74.12)

Proposed § 128.303 would amend VA's documentation requirements at 38 CFR 74.12 for application to CVE. This amendment would include general requirements for submission to SBA rather than list each document individually as with the current VA

regulation. As proposed, this section would grant certification based on participants in SBA's 8(a) Business Development and WOSB/EDWOSB programs that are owned and controlled by one or more veterans, or in the case of SDVO SBCs, service-disabled veterans. The proposed amendment would demonstrate how applicants may submit documentation as evidence of program eligibility. Proposed § 128.303 would add paragraphs (d) and (e) to require a concern to provide a full explanation in the case of an applicant that was previously decertified, previously denied certification, or failed to notify SBA of a material change affecting its eligibility. SBA is seeking comment whether an explanation in these circumstances should be required as part of an application and if so, should SBA establish a time limit for reapplication in which an explanation would be required (e.g., A firm that reapplies within three years of denial would be required to provide an explanation of that denial. If that firm reapplies after a period of three years, it would not be required to submit an explanation with the application).

In terms of demonstrating that an applicant qualifies as a small business, the proposed rule would provide that an applicant must demonstrate that it qualifies as small under the size standard corresponding to any NAICS code under which it currently conducts business activities. SBA believes that this standard makes more sense than requiring an applicant to qualify as small under the size standard corresponding to its primary industry classification. In order to be eligible for a specific SDVO or VO small business contract, a firm must qualify as small under the size standard corresponding to the NAICS code assigned to that contract. Whether a firm qualifies as small under its primary industry classification is not relevant to that determination (unless the size standard for the firm's primary industry classification is the same as that for the NAICS code assigned to the contract, but even then, the only relevant size standard is that corresponding to the NAICS code assigned to the contract). SBA believes that a firm that

does not qualify as small under its primary industry classification should not be precluded from seeking and being awarded SDVO or VO small business contracts if it qualifies as small for those contracts. SBA believes that the certification process should ensure that an applicant is owned and controlled by one or more veterans or service-disabled veterans and that it could qualify as a small business for a VO or SDVO set-aside contract. As such, SBA believes that requiring an applicant to demonstrate that it qualifies as small for any industry under which it currently conducts business is more appropriate than requiring it to demonstrate that it qualifies as small under its primary industry classification.

Section 128.304 Can an applicant appeal SBA's initial decision to deny an application?
(Former § 74.13)

Proposed § 128.304 would include VA's regulation at 38 CFR 74.13 for a denied application with CVE and proposed revisions would remove references to VA and reflect SBA's certification program. In addition, this section would add a sentence at the beginning of § 128.304(a) which would clearly establish that there is no reconsideration process for initial applications once they have been denied. SBA believes that the appeals process with SBA's Office of Hearings and Appeals (OHA) as outlined in 13 CFR part 134 serves as an adequate substitute for the process of reconsideration. Given that this proposed rule would eliminate reconsideration upon initial application, SBA proposes to shorten the reapplication period after denial from 6 months to 90 calendar days. SBA seeks comment on the proposed elimination of the reconsideration process. If, on appeal, OHA overturns SBA's initial decision to deny an applicant, should SBA consider a reconsideration process where the remanded application is then denied for reasons other than those identified in the initial application? Should SBA allow a reconsideration of all denials prior to OHA appeal? SBA also requests comment specifically on denial decisions based solely on eligibility as a veteran or service-disabled veteran. Current VA

regulations do not allow for reconsideration of these types of denials. Should SBA allow for reconsideration in these limited circumstances?

This section as proposed would not incorporate 38 CFR 74.13(b) through (f): paragraph (b) reconsideration of veteran eligibility criteria, paragraph (c) reconsideration, paragraph (d) is no longer applicable as it references an SBA determination on size, paragraph (e) is a duplicate of paragraph (b), and paragraph (f) is a second reference to the reconsideration process.

Section 128.305 Can an applicant or participant reapply for certification? (Former § 74.14)

As proposed, § 128.305 would include VA's 38 CFR 74.14 reapplication requirements, proposed revisions would remove references to VA and to reflect SBA's certification program. SBA's proposed rule would adopt the VA requirement that the applicant must wait for a period of 90 calendar days after a denial decision before a new application will be processed by SBA. As proposed participants may reapply for certification within 120 calendar days of the end of their eligibility period and the subsequent eligibility period would be based on the date of the new determination letter. SBA is requesting comment on this proposed procedure for recertification. Specifically, should SBA reduce the window for applicants to reapply prior to the end of eligibility period and if an applicant successfully reapplies to the Vets Program, should the eligibility period be based on the original date that eligibility was set to expire as opposed to the date of the determination letter?

Section 128.306 What length of time may a business participate in the Veterans Certification Program? (Former §74.15)

Proposed § 128.306 would include VA's 38 CFR 74.15 program eligibility term and continuing obligation requirements, including a provision specifying that a business concern would receive an eligibility term of three years from the date of SBA's approval

letter establishing its VO SBC or SDVO SBC certified status. Proposed revisions would remove references to VA and reflect SBA's certification program. SBA does not believe that yearly recertification is necessary, but requests comments as to whether recertification every three years is the appropriate term of certification. Paragraphs (e) and (f) of this section would include the consequences of a program examination referenced in paragraph (d). For organizational purposes, SBA would redesignate paragraphs (e) and (f) as paragraphs (d)(1) and (2), respectively. SBA's proposed rule would adopt VA's eligibility period of three years. SBA is soliciting comment on whether that period is appropriate for the proposed SBA Vets Program.

Section 128.307 What are a Participant's ongoing obligations to SBA? (Former § 74.3(b))

Proposed § 128.307 would include 38 CFR 74.3(b) that requires participants to notify CVE of any change of ownership; proposed revisions would remove references to VA and to reflect SBA's certification program. This section as proposed does not require prior SBA approval of a material change. SBA is soliciting comment as to whether this section should require SBA approval prior to a material change that could affect eligibility. Sections 36 and 36A of the Small Business Act (15 U.S.C. 657f and 657f-1) "require the periodic recertification" of a firm's status as an eligible VO SBC or SDVO SBC. As noted above in § 128.306, SBA is proposing that a VO SBC or SDVO SBC certification generally last three years. SBA has interpreted the "periodic recertification" requirement set forth in the Small Business Act to require recertification every three years. This proposed rule would not require participants to recertify on an annual basis as an ongoing obligation. SBA requests comments as to whether three years is the appropriate length of time to require recertification. SBA wants to ensure that it meets its statutory mandate, but at the same time does not want to impose any unnecessary burdens on VO SBCs and SDVO SBCs.

Section 128.308 What is a certification examination and what will SBA examine?

(Former § 74.20)

Proposed § 128.308 would include VA's 38 CFR 74.2(a) verification exam requirements, with revisions that would remove references to VA and to reflect SBA's certification program.

Section 128.309 What are the ways a business may exit certification status? (Former § 74.21)

Proposed § 128.309 would include VA's 38 CFR 74.21 guidelines on exiting the CVE program, with revisions that would remove references to VA and reflect SBA's certification program. The proposed section would also include paragraph (d)(10) which adds failure to recertify as good cause to remove a firm from the Vets Program.

§ 128.310 What are the procedures for decertification? (Former § 74.22)

Proposed § 128.310 would include VA's 38 CFR 74.22 guidelines on canceling program participation by the agency; proposed revisions would remove references to VA and to reflect SBA's certification program.

Subpart D — Federal Contract Assistance

Section 128.400 What are VO and SDVO contracts? (Former § 125.17)

As proposed, § 128.400(a) would amend the text in § 125.17 to reflect VA's authority to award set-aside and sole source to VO SBCs and SDVO SBCs. The amendment references the VA Acquisition Regulation (VAAR) at chapter 8 of title 48, Code of Federal Regulations. An additional amendment at § 128.400(b) as proposed, would distinguish VA contracts from SDVO SBC contracts with the rest of the Federal Government.

Section 128.401 What requirements must an SDVO SBC meet to submit an offer on a contract? (Former § 125.18)

As proposed, § 128.401 would amend the current regulation at § 125.18(a) to require certification to be eligible for a VO or SDVO SBC set-aside or sole source contract. The proposed rule would add § 128.401(a)(2)(i) and (ii) to allow an uncertified VO SBC or SDVO SBC to submit an offer while their application is pending with SBA. SBA intends to prioritize those applications where the contracting officer has identified the applicant as the apparent successful offeror. This proposed rule would also amend former paragraph (b) at § 125.18 to add eligibility for VO SBC joint ventures (JV) in the Vets Program and reference § 128.402, a new stand-alone section to address JV requirement for VOVO SBCs and SDVO SBCs. The remaining paragraphs in § 125.18 would add references to VO SBCs.

Section 128.402 May a joint venture submit an offer on a VO SBC or SDVO SBC requirement? (Former § 125.18(b))

As stated above, SBA is proposing a stand-alone § 128.402 that would address JV requirements for VOVO SBCs and SDVO SBCs. Section 128.402(a) as proposed, generally would state conditions upon which a JV may be certified by SBA and as set forth in 48 CFR part 819, includes the requirement that all joint ventures must be certified to be awarded a VO SBC or SDVO SBC contract with VA. SBA does not intend to require SDVO SBC JVs to certify for contracts with the rest of the Federal Government.

The proposed rule would also add paragraph (b)(11) in § 128.402 to provide that a VO SBC or SDVO SBC participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific VO SBC or SDVO SBC contract.

Although the proposed rule would apply this requirement to all contracts, procuring agencies and small businesses have raised concerns to SBA in the context of multiple award contracts where it is possible that one firm could be a member of several joint ventures that receive contracts. In such a situation, several agencies were troubled that orders under the Multiple Award Contract may not be fairly competed if one firm was

part of two or more quotes. They believed that one firm having access to pricing information for several quotes could skew the pricing received for the order.

Sections 128.403 through 128.408 (Former §§ 125.21 through 125.26)

Generally, §§ 128.403 (former §125.21) “requirements not available to VO or SDVO contracts,” 128.405 (former § 125.23) “sole source contracts to VO and SDVO SBCs,” and 128.406 (former § 125.24) “VO or SDVO contracts at or below the simplified acquisition threshold” would be amended to distinguish VA procurements from all other procurements. As previously stated, VAAR specifically governs requirements exclusive to VA prime and subcontracting actions at chapter 8 of title 48, Code of Federal Regulations, and supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

As proposed, § 128.404(d) would add a requirement that prohibits agencies from requiring one or more certifications in addition to its VO SBC/SDVO SBC certification. This amendment is already included in SBA’s regulations at § 125.2(e)(6)(i) but had not been added to the SDVO SBC program.

No amendments are proposed were made to existing regulations in either § 128.407 or § 128.408 currently at § 125.25 or § 125.526.

Subpart E - Protests Concerning VO SBCs and SDVO SBCs

Section 128.500 What are the requirements for filing a VO SBC and SDVO SBC status protest? (New)

As proposed, § 128.500 would serve as the sole section addressing status protests for VO SBCs and SDVO SBCs. Currently, SBA’s Director of Government Contracting processes all status protests of self-certified SDVO SBCs for non-VA contracts in accordance with 13 CFR part 125 and SBA’s OHA hears all challenges to a VO SBC or SDVO SBC’s inclusion in the VA database in accordance with 38 U.S.C. 8127(f)(6)(B)(i). NDAA 2021 transfers the entirety of 38 U.S.C. 8127(f) to 15

U.S.C. 657f and authorizes OHA to review all status protests of VO SBCs and SDVO SBCs, regardless of the procurement agency. Accordingly, proposed part 128 would not include §§ 125.27 through 125.31 on SDVO SBC status protests. Proposed § 128.500 would add paragraph (a) to reflect revised status protest procedures described above with a reference to part 134. Paragraph (b) as proposed would distinguish separate procedures for size and status protests. Amendments to part 134 are not included in this proposed rule and will be amended separately to reference SBA's Veterans Certification Program.

Subpart F - Penalties and Retention of Records

The proposed rule would adopt SBA's existing regulations at 13 CFR 125.32 and 33 (former §§ 125.32 and 125.33) and revise the sections to add reference to VO SBCs. SBA previously administered only the SDVO SBC self-certification program, so §§ 125.32 and 125.33 did not specifically reference VO SBC requirements.

Subpart G - Surplus Personal Property for Veteran-Owned Small Business

Programs

Section 128.700 How does a small business concern owned and controlled by veterans obtain Federal surplus personal property? (Former § 125.100)

The Veterans Small Business Enhancement Act provides that VO SBCs should be considered for surplus personal property distributions. Those firms seeking to participate in the program are required to be verified by VA's CVE as a condition of eligibility. Section 128.700(a)(1) would amend this regulation to reflect the transfer of certification to SBA as mandated by NDAA 2021.

Part 121

This proposed rule would amend references to the current SDVO SBC program in part 121. These amendments would correspond to the newly-created part 128.

SBA has not proposed amendments to part 124, 127, or 134 with this rulemaking. However, SBA is seeking comment whether the final rule should include amendments to

these parts to reflect the proposed Vets Program. For example, part 124 may need to be amended to reflect reciprocity with the proposed Vets Program; part 127 grants reciprocity to firms verified by CVE and would be amended to reference this Vets Program; and part 134 would need to be amended to remove references to CVE and update procedures for denial, cancellation, and inclusion in the SBA database.

III. Compliance with Executive Orders 12866, 12988, 13132, 13175, 13563, the Congressional Review Act (5 U.S.C. 801–808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866.

Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

This rulemaking is necessary to satisfy statutory requirements to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021 amendments to the Small Business Act which requires SBA to certify VO SBCs and SDVO SBCs.

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a regulatory action that modifies or replaces an existing regulation, a baseline assuming no change to the regulation generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives.

Baseline

Section 862 of NDAA 2021 amended sections 36 and 36A of the Small Business Act to require SBA to certify the status of VO SBCs and SDVO SBCs seeking sole source and set-aside contracts across the Federal Government. This regulation would replace VA's existing regulations governing the verification of VO SBCs and SDVO SBCs for sole source or set-aside contracts awarded by VA. Prior to NDAA 2021, SDVO SBC firms seeking to contract with Federal agencies other than VA only needed to self-certify their status. SDVO SBC firms currently self-certifying must apply within a one-year grace period after the Transfer Date.

SBA's proposed regulations will not add any additional burden to current participants in VA's VIP Verification Program. The VIP Verification Program has a three-year term of eligibility and to enter the program, applicants submit an online application with documents supporting the application. To remain in the program, VA requires participants to notify the agency of a change in circumstances such as a change in ownership or control of the firm. VA also requires participants to undergo a program examination to verify the accuracy of any statement or information provided as part of the verification application process. At the end of the three-year term of eligibility, a participant must reapply to the program using the same procedures as the initial application.

With the proposed regulations, SBA would institute the same process of initial application, program examination, and reapplication at the end of the applicant's three-year term of eligibility. Firms verified by VA prior to the Transfer Date would be deemed eligible by SBA for the time that remains in the firm's three-year term of eligibility. To remain certified by SBA after the Transfer Date, those verified firms would be required to meet all conditions of eligibility as described in the proposed regulation such as certification examinations and reapplication at the end of the firm's term of eligibility.

Current participants in the VIP Verification Program would have no additional cost burden associated with the SBA's proposed regulations implementing the Veterans Certification Program. VA existing regulations for VO SBCs and SDVO SBCs that contract solely with the VA serve as an appropriate benchmark for this regulatory impact analysis. Accordingly, this analysis will focus on the benefits and costs to those previously self-certified SDVO SBCs that would be required to certify with SBA.

Benefit

The benefit of the proposed regulation is a reduction in the ambiguity and uncertainty for contracting officers in the process of making Federal contract awards to eligible SDVO firms that were previously only required to self-certify. Under the existing system for agencies outside of VA, the burden of SDVO SBC eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a SDVO SBC contract. Under this proposed rule, the burden is placed upon SBA. All a contracting officer needs to do is to confirm that the firm is in fact a certified SDVO SBC in SBA's certification database and a responsible contractor. A contracting officer would not have to look at any documentation provided by a firm or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for SDVO SBC Vets Program participants as the validation process will be controlled by SBA in the System for Award Management (SAM), the Dynamic Small Business Search (DSBS) database, and SBA's certification database. The reduced responsibility to verify eligibility at contract award may also result in a minor cost savings to the contracting agencies.

Cost

While current participants in the Vet VIP Verification Program would have no additional costs associated with the proposed regulations, SBA anticipates costs

associated with self-certified SDVO SBCs currently seeking contracts with the rest of the Federal Government. Previously, those firms only needed to self-certify their status to pursue SDVO SBC sole source and set-asides. With NDAA 2021, those firms must apply to SBA for certification within a one-year grace period ending on January 1, 2024.

Eligible SDVO SBC firms that are certified by SBA after the Transfer Date will then be required to meet all program eligibility requirements going forward to include: notify SBA of a change in circumstances, undergo a program certification examination, and reapply for certification at the end of their eligibility period.

To estimate the number of SDVO SBC applicants within the first year of the certification, SBA reviewed firms actively registered as SDVO SBCs in SAM. SBA believes that the number of firms listed in SAM is the most recent and reliable data to estimate participation and total costs of the Vets Program for the purposes of this regulatory impact study. Registration in SAM is required for all businesses seeking to contract with the Federal Government, registrants may select to represent themselves as SDVO SBCs without going through a certification process, and firms must recertify their registration one-year after initial SAM registration. While it is not anticipated that every firm registered as an SDVO SBC in SAM will apply for certification within the first year of the Vets Program, SAM registrations serve as what SBA would consider the maximum number of firms that would likely seek certification.

Accordingly, SBA estimates that as many as 21,468 self-certified SDVO SBCs could apply for initial certification within the first year of the program. This estimate is based on 32,284 SDVO SBC firms registered in SAM and excludes 10,816 firms registered in SAM but already verified by VA as of December 2021.

SDVO SBCs Registered in SAM	32,284
Less: VA-Verified SDVO SBCs Included in SAM	10,635

Self-Certified SDVO SBCs	21,649
Less: VA-Verified VO SBCs Self-Certified as SDVO SBCs	181
Self-Certified SDVO SBCs Anticipated to Seek SBA Certification	21,468

The following table represents the estimated total number of Program Participant actions during the first five years of the Vets Program.

Number of Program Participants				
Year	Initial applications	Program Examinations	Recertifications	Yearly Totals
1	17,174	1,025	2,114	19,288
2	8,500	560	2,006	10,506
3	7,500	420	527	8,027
4	7,500	810	7,715	15,215
5	7,500	635	4,202	11,706
Totals	48,174	3,455	16,565	64,739

For the purposes of this proposed rule, SBA estimated “time to complete” for three types of certification actions: initial application, program examination, and reapplication at the end of the eligibility period. For the initial application, SBA estimates that applicants would complete the application process in 1 hour, a program examination in 1 hour, and reapplication in 1 hour. The estimated time to complete would include entering information into SBA’s online application platform and submission of

supporting documentation to prove eligibility. It also assumes that the information requested by SBA during initial certification is already held by the firms during the ordinary course of business and would require minimum preparation prior to submission. Similarly, participants would be minimally burdened during program examinations and reapplications. During their period of eligibility, participants would be required to review, maintain, and update documentation submitted to SBA during initial certification. In the event of a change in circumstances while in the Program, participants would have previously notified SBA of the change and already uploaded documentation to support eligibility. SBA's proposed rule would not require additional information or documents that the firm would not already have on hand and would not impose additional burden on the participant. SBA is soliciting comment as to whether these times to complete these actions are reasonable.

Hourly cost to the participant is based on estimated manager's salary of \$93.44/hour (based on the median hourly wage of \$46.72 for construction managers, according to the BLS 2020 Occupational Outlook Handbook, plus 100% for benefits and overhead). Based on an estimate of 1 hour per program action and an hourly cost of \$93.44, the five-year total cost burden for the proposed rule would be \$3,219,569. SBA estimates that an applicant's cost burden to apply and maintain eligibility for this proposed Program would require 3 total hours at a cost burden of \$280.32 per applicant.

Costs to Participants				
Year	Initial applications	Program Examinations	Recertifications	Yearly Totals
1	\$1,604,776	\$95,776	\$197,532	\$1,898,084

2	\$794,240	\$52,326	\$187,441	\$1,034,007
3	\$700,800	\$39,712	\$49,243	\$789,755
4	\$700,800	\$75,686	\$720,923	\$1,497,410
5	\$700,800	\$59,334	\$392,672	\$1,152,807
Totals	\$4,501,416	\$322,835	\$1,547,811	\$6,372,062

SBA believes that participants would not incur any start-up costs, operation or maintenance costs, service costs, or require additional capital as a result of this proposed rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained by the applicant in the ordinary course of business. SBA is soliciting comment as to whether this assumption is accurate.

SBA estimates the cost to the government of implementing the certification program to be \$30M across fiscal year (FY) 2022 and FY2023 and approximately \$20M annually thereafter. SBA worked with VA and OMB to secure a \$10M transfer from VA's Supply Fund to cover transition costs, including tech system development. An additional \$20M was requested in the President's Budget for FY2023 for year one program operations. SBA and VA anticipate an up to 250% surge in application volume relative to VA's current volume. The increase in volume will be handled primarily by surging contract support. SBA's \$20M request includes \$2.5M for full time equivalents (FTEs) (current salaries and expenses (S&E) for VA FTEs assigned to the program), \$1.35M for information technology (IT) overhead (system maintenance and standard IT services for staff and contractors), and \$16M in contract costs (based on FY21 VA contract costs scaled to account for application surge and projected efficiencies). The cost of operating the program may decrease after the initial application surge, but would rise

every third year when the 2023 cohort is up for recertification. This cost estimate also eliminates CVE's costs of administering the program. CVE reported a cost of \$12,302,497 for 14,762 cases in FY2021. This cost is not directly comparable to SBA's estimate, however, because it excludes items like some support costs, that are included in SBA's cost estimate.

3. What are the alternatives to this rulemaking?

This proposed rule would implement specific statutory provisions in Section 862 of the 2021 NDAA. There are no alternatives that would meet the statutory requirements.

Executive Order 12988

This proposed rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This proposed rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive order. As such it does not warrant the preparation of a federalism assessment.

Executive Order 13175

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

This Executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considers these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible the agency utilized the most recent data available in the Federal Procurement Data System-Next Generation, SAM, and VA’s VIP database.

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among Government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule will have a 30-day comment period and will be posted on www.regulations.gov to allow the public to comment meaningfully on its provisions. SBA believes a 30-day comment period is reasonable and sufficient for this proposed rule for several reasons. First, SBA believes a 30-day comment period is sufficient for this

proposed rule because the rule does not propose significant changes to the programs that are not statutorily mandated. In drafting this proposed rule, SBA sought to minimize the impact to the certification process as the certification authority moves to SBA and generally adopted VA's existing program guidelines in 38 CFR part 74. Second, SBA anticipates that this proposed rule will receive a substantial number of comments from the public, even with a 30-day comment period. Third, SBA and VA have taken significant efforts to engage the veteran small business community during preparations for the transfer and have used this engagement as consideration while drafting this proposed rule. Finally, a 30-day comment period is needed due to the time required to promulgate a final rule to be effective on January 1, 2023. SBA intends to use these comments as an integral component in drafting the final rule.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

This rulemaking is necessary to satisfy statutory requirements to implement section 862 of 2021 NDAA 2021. A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866.

Congressional Review Act (5 U.S.C. 801–808)

The Congressional Review Act, 5 U.S.C. § 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a “major rule” may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rulemaking and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days

after it is published in the *Federal Register*. This rulemaking has been reviewed and determined by OMB not to be a “major rule” under 5 U.S.C. 804(2).

Paperwork Reduction Act, 44 U.S.C. Ch. 35

In carrying out its statutory mandate to certify VO SBC and SDVO SBC firms, SBA intends to collect information from VO SBC and SDVO SBC applicants or participants through an online application system. This collection of information will require submission or retention of documents that support the applicant's certification and continued eligibility.

SBA intends to implement a certification and information collection platform that replicates the currently approved information collection by VA’s CVE (OMB Control Number 2900-0675). In other words, the information collected by SBA will include eligibility documents previously collected by VA. SBA does not anticipate that these changes would impact the content of the information currently collected or add additional burden to what is currently required by VA for verification.

As discussed above, this rule proposes to fully implement the statutory requirement for small business concerns to be certified by SBA in order to be awarded a set-aside or sole source contract under the Veterans Certification Program. As a result of these changes, the rule proposes to eliminate SDVO SBC self-certification and set the standards for certification by SBA. SBA anticipates that these changes would impact firms currently self-certifying; however, this impact would be minimal as this information is already held by applicants during the ordinary course of business and would require minimum preparation prior to submission.

At this time, SBA does not have an OMB-approved method for collection but intends to have approval for the collection of information before the rule is finalized.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.” This proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect “small organizations” or “small governmental jurisdictions.” SBA's contracting programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA's regulations.

As stated in the regulatory impact analysis, this rulemaking will impact approximately 21,468 service-disabled veteran-owned small businesses. If adopted in final form, these businesses will have to apply to SBA for certification. However, SBA has proposed to minimize the impact on VO SBCs and SDVO SBCs by accepting verifications already received from VA's CVE program during the term of the firm's eligibility period, and by providing SDVO SBC firms that self-certify a one-year grace period to apply for certification. The additional costs to VO SBCs and SDVO SBCs for certification should be minimal, because the required documentation already exists and is maintained in the normal course of business: such as articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc. In addition, applicants must already provide

this information to VA’s CVE for verification. SBA does not anticipate that these changes would impact the content of the information currently collected. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 128

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR chapter I as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, 694a(9), and 9012.

§ 121.103 [Amended]

2. Amend § 121.103 by removing the references to “§ 125.18(b)(2) and (3)” in paragraph (h)(1)(ii) and adding in their place a reference to “§ 128.402(b)(2) and (3)”.

§ 121.404 [Amended]

3. Amend § 121.404 by removing the reference to “§ 125.18(b)(2) and (3)” in paragraph (d) and adding in its place a reference to “§ 128.402(b)(2) and (3)”.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

4. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657b, and 657r.

Subparts A through F [Removed]

5. Remove subparts A through F, consisting of §§ 125.11 through 125.100.

6. Add part 128 to read as follows:

PART 128 – VETERANS CERTIFICATION PROGRAM

Subpart A – Provisions of General Applicability

Sec.

- 128.100 What is the purpose of this part?
- 128.101 What type of assistance is available under this part?
- 128.102 What definitions are important in the Veterans Certification Program?

Subpart B – Eligibility Requirements for the Veterans Certification Program

Sec.

- 128.200 What are the requirements a concern must meet to qualify as a VO SBC or SDVO SBC?
- 128.201 What other eligibility requirements apply for individuals or businesses?
- 128.202 Who does SBA consider to own a VO SBC or SDVO SBC?
- 128.203 Who does SBA consider to control a VO SBC or SDVO SBC?
- 128.204 What size standards apply to VO SBCs and SDVO SBCs?

Subpart C – Certification of VO SBC or SDVO SBC Status

Sec.

- 128.300 How is a concern certified as a VO SBC or SDVO SBC?
- 128.301 Where must an application be filed?
- 128.302 How does SBA process applications for certification?
- 128.303 What must a concern submit to apply for VO SBC or SDVO SBC certification?
- 128.304 Can an Applicant appeal SBA's initial decision to deny an application?
- 128.305 Can an Applicant or Participant reapply for certification?
- 128.306 What length of time may a business participate in SBA's Veterans Certification Program?
- 128.307 What are a Participant's ongoing obligations to SBA?
- 128.308 What is a certification examination and what will SBA examine?
- 128.309 What are the ways a business may exit certification status?
- 128.310 What are the procedures for decertification?

Subpart D – Federal Contract Assistance

Sec.

- 128.400 What are VO and SDVO contracts?
- 128.401 What requirements must a VO SBC or SDVO SBC meet to submit an offer on a contract?
- 128.402 May a joint venture submit an offer on a VO SBC or SDVO SBC requirement?

- 128.403 What requirements are not available for VO or SDVO contracts?
- 128.404 When may a contracting officer set aside a procurement for VO SBCs or SDVO SBCs?
- 128.405 When may a contracting officer award sole source contracts to VO SBCs and SDVO SBCs?
- 128.406 Are there VO or SDVO contracting opportunities at or below the simplified acquisition threshold?
- 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as an SDVO contract?
- 128.408 What is the process for such an appeal?

Subpart E – Protests Concerning VO SBCs and SDVO SBCs

Sec.

- 128.500 What are the requirements for filing a VO SBC and SDVO SBC status protest?

Subpart F – Penalties and Retention of Records

Sec.

- 128.600 What are the requirements for representing VO SBC or SDVO SBC status, and what are the penalties for misrepresentation?
- 128.601 What must a concern do in order to be identified as a SDVO SBC in any Federal procurement databases?

Subpart G – Surplus Personal Property for Veteran-Owned Small Business Programs

Sec.

- 128.700 How does a small business concern owned and controlled by veterans obtain Federal surplus personal property?

Authority: 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f-1.

Subpart A – Provisions of General Applicability

§ 128.100 What is the purpose of this part?

Section 8127 of Title 38 within the U.S. Code (38 U.S.C. 8127) authorizes certain procurement mechanisms to provide Veteran-Owned Small Business Concerns (VO SBC) and Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC) with contracting assistance opportunities at the Department of Veterans Affairs (VA). Section 36 of the Small Business Act (15 U.S.C. 657f) authorizes certain procurement mechanisms to provide SDVO SBCs with contracting assistance opportunities across the Federal Government. In addition, sections 36 and 36A of the Small Business Act (15 U.S.C. 657f, 657f-1) authorize the Small Business Administration (SBA) to certify the status of VO and SDVO SBCs. This part implements these mechanisms and ensures that

the program created, referred to as the Veterans Certification Program, is substantially related to this important congressional goal in accordance with applicable law.

§ 128.101 What type of assistance is available under this part?

Contracting officers are authorized to restrict competition or award sole source contracts or orders to eligible Service-Disabled Veteran-Owned Small Businesses. In addition, 48 CFR chapter 8 authorizes VA contracting officers to restrict competition or award sole source contracts or orders to eligible Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses.

§ 128.102 What definitions are important in the Veterans Certification Program?

Applicant means a firm applying for inclusion in the certification database.

Contracting officer has the meaning given such term in section 2101 of the Office of Federal Procurement Policy Act (41 U.S.C. 2101).

Day-to-day operations of a firm means the marketing, production, sales, and administrative functions of the firm.

Eligible individual means a veteran, service-disabled veteran, or surviving spouse, as defined in the United States Code and this part.

ESOP has the meaning given the term “employee stock ownership plan” in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

Extraordinary circumstances, for purposes of this part, are only the following:

- (1) Adding a new equity stakeholder;
- (2) Dissolution of the company;
- (3) Sale of the company;
- (4) The merger of the company; and
- (5) Company declaring bankruptcy.

Interested party means the contracting activity's contracting officer, SBA, any concern that submits an offer for a specific sole source or set-aside VO or SDVO contract

or order (including Multiple Award Contracts), or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a reserve of an award given to a VO or SDVO SBC.

Joint venture is an association of two or more business concerns for which purpose they combine their efforts, property, money, skill, or knowledge in accordance with this part. A joint venture must be comprised of at least one service-disabled veteran-owned (or veteran-owned as applicable) small business. For VA contracts, a joint venture must be in the form of a separate legal entity.

Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

Non-veteran means any individual who does not claim veteran status, or upon whose status an Applicant or Participant does not rely in qualifying for certification.

Participant means a veteran-owned or service-disabled veteran-owned small business concern that has certified status with SBA.

Permanent caregiver, for purposes of this part, is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, as determined by the Department of Veterans Affairs' Veterans Benefits Administration, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability.

(1) A permanent caregiver may be appointed, in a number of ways, including:

(i) By a court of competent jurisdiction;

(ii) By the Department of Veterans Affairs, National Caregiver Support Program, as the Primary Family Caregiver of a Veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by law and the Secretary and may be revoked if the eligibility criteria do not continue to be met); or

(iii) By a legal designation.

(2) Any appointment of a permanent caregiver must in all cases be accompanied by a written determination from the Department of Veterans Affairs that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension. The appointment must also delineate why the permanent caregiver is given the appointment, must include the consent of the veteran to the appointment and how the appointment would contribute to managing the veteran's well-being.

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the Participant. The NAICS code designations are described in the NAICS Manual published by the U.S. Office of Management and Budget.

Principal place of business means the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's current business records are kept. If the office from which management is directed and where the current business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

Service-connected has the meaning given that term in 38 U.S.C. 101(16).

Service-disabled veteran is a veteran who possesses either a valid disability rating letter issued by the Department of Veterans Affairs, establishing a service-connected

rating between 0 and 100 percent, or a valid disability determination from the Department of Defense or is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran. Reservists or members of the National Guard disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualify.

Service-disabled veteran with a permanent and severe disability means a veteran with a service-connected disability that has been determined by the Department of Veterans Affairs, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

Small business concern means, at the time of qualification, a concern that, with its affiliates, meets the size standard corresponding to any NAICS code under which it currently conducts business activities, pursuant to part 121 of this chapter. At time of contract offer, a VO or SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract.

Surviving spouse has the meaning given the term in 38 U.S.C. 101(3).

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

VA is the U.S. Department of Veterans Affairs.

Veteran has the meaning given the term in 38 U.S.C. 101(2). A Reservist or member of the National Guard called to Federal active duty or disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualifies as a veteran.

Veterans Affairs Acquisition Regulation (VAAR) is the set of rules that specifically govern requirements exclusive to VA prime and subcontracting actions. The VAAR, 48 CFR chapter 8, supplements the Federal Acquisition Regulation (FAR) in 48 CFR chapter 1, which contains guidance applicable to most Federal agencies.

Subpart B - Eligibility Requirements for the Veterans Certification Program

§ 128.200 What are the requirements a concern must meet to qualify as a VO SBC or SDVO SBC?

(a) *Qualification as a Veteran-Owned Small Business Concern.* To qualify as a VO SBC, a business entity must be:

(1) A small business concern under the size standard corresponding to any NAICS code under which it currently conducts business activities;

(2) Not less than 51 percent of which is owned by one or more veterans or, in the case of any publicly owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) of which is owned by one or more veterans; and

(3) The management and daily business operations of which are controlled by one or more veterans.

(b) *Qualification as a Service-Disabled Veteran-Owned SBC.* To qualify as an SDVO SBC, a business entity must be:

(1) A small business concern under the size standard corresponding to any NAICS code under which it currently conducts business activities;

(2) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly-owned business, not less than 51 percent of the

stock (not including any stock owned by an ESOP) of which is owned by one or more service-disabled veterans; and

(3) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran.

(c) *Veteran-Owned SBC and Service-Disabled Veteran-Owned SBC certifications.*

(1) A concern must be certified as a VO or SDVO SBC pursuant to § 128.300 in order to be awarded a VO or SDVO set-aside or sole source contract.

(2) Other small business concerns that do not seek SDVO set-aside or sole source contracts may continue to self-certify their status, receive prime contract or subcontract awards outside the programs, and count toward an agency's goal for awards.

§ 128.201 What other eligibility requirements apply for individuals or businesses?

(a) *Suspension and debarment.* In order to be eligible for VO or SDVO SBC certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management at the time of application or recertification or at any time during the concern's period of eligibility. If, after certifying the Participant's eligibility, SBA discovers that a firm has an active exclusion, SBA will remove the Participant from the certification database immediately, notwithstanding the provisions of § 128.308.

(b) *Good character.* Individuals having an ownership or control interest in certified businesses must have good character. If, after certifying a Participant's eligibility, the person(s) controlling the Participant is found to lack good character, SBA will immediately terminate the Participant's certification, notwithstanding the provisions of § 128.310.

(c) *False statements.* If, during the processing of an application, SBA determines, by a preponderance of the evidence standard, that an Applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after certifying the Participant's eligibility, SBA discovers that false statements or information have been submitted by a firm, SBA will remove the Participant from the certification database immediately, notwithstanding the provisions of § 128.310. Whenever SBA determines that the Applicant submitted false information, the matter will be referred to the SBA Office of Inspector General for review. In addition, SBA may request that debarment proceedings be initiated by the agency.

(d) *Financial obligations.* Neither an Applicant firm nor any of its eligible individuals that fail to pay significant financial obligations, including unresolved tax liens and defaults on Federal loans, other government-assisted financing, owed to the Federal Government is eligible for certification. However, a firm will not be ineligible to participate in the Veterans Certification Program if the firm or the affected principals can demonstrate that the financial obligations owed have been settled, discharged, or forgiven by the Federal Government. If after certifying the Participant's eligibility SBA discovers that the Participant no longer satisfies this requirement, SBA will remove the Participant from the certification database in accordance with § 128.310.

(e) *Protest decisions or other negative findings.* Any firm verified in the certification database that is found to be ineligible by a VO or SDVO status protest decision will be immediately removed from the certification database, notwithstanding the provisions of § 128.310. Any firm certified in the certification database that is found to be ineligible due to an SBA protest decision or other negative finding may be immediately removed from the certification database, notwithstanding the provisions of

§ 128.310. Until such time as SBA receives official notification that the decision is overturned on appeal or the firm applies for and receives certified status from SBA, the firm will not be eligible to participate in the Veterans Certification Program.

(f) *System for Award Management (SAM) registration.* All Applicants and Participants must be registered in SAM at <https://www.sam.gov>, or successor system, prior to application submission.

§ 128.202 Who does SBA consider to own a VO SBC or SDVO SBC?

Generally, a concern must be at least 51% unconditionally and directly owned by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans. More specifically:

(a) *Ownership must be direct.* Ownership by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans, must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more veterans or service-disabled veterans does not meet the requirement in this paragraph (a). Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by veterans or service-disabled veterans where the trust is revocable, and veterans or service-disabled veterans, respectively, are the grantors, trustees, and the current beneficiaries of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans. In the case of a publicly-owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more veterans.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by veterans, or in the case of an SDVO SBC, service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans or non-service-disabled veterans, in the case of an SDVO SBC, will be treated as exercised, except for any ownership interests which are held by investment companies licensed under 15 U.S.C. 681 et. seq.

(f) *Change of ownership.* A concern may change its ownership or business structure so long as one or more veterans, or in the case of an SDVO SBC, service-disabled veterans own and control it after the change. A concern must notify SBA of a change of ownership in accordance with § 128.307 and attest to continued eligibility.

(g) *Dividends and distributions.* One or more veterans or, in the case of an SDVO SBC, service-disabled veterans must be entitled to receive:

(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock or member interest is sold;

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock or member interest owned in the event of dissolution of the corporation, partnership, or limited liability company; and

(4) An eligible individual's ability to share in the profits of the concern must be commensurate with the extent of his/her ownership interest in that concern.

(h) *Community property*. Ownership will be determined without regard to community property laws.

(i) *Surviving spouse*. (1) A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period specified in paragraph (i)(2) of this section if:

(i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;

(ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)); and

(iii) For a Participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the certification database.

(2) The time period described in paragraph (i)(1)(iii) of this section is the time period beginning on the date of the veteran's death and ending on the earlier of --

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) In the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, is 10 years after the date of the death of the veteran; or

(iv) In the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability, is 3 years after the date of the death of the veteran.

§ 128.203 Who does SBA consider to control a VO or SDVO SBC?

(a) *General.* To be an eligible VO SBC, the management and daily business operations of the concern must be controlled by one or more veterans. To be an eligible SDVO SBC, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more veterans, or in the case of an SDVO SBC, service-disabled veterans, means that both the long-term decision-making and the day-to-day management and administration of the business operations must be conducted by one or more veterans or service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

(b) *Managerial position and experience.* A veteran, or in the case of an SDVO SBC, a service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must hold the highest officer position in the concern (usually President or Chief Executive Officer (CEO)) and must have managerial experience of the extent and complexity needed to run the concern. The veteran or service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found to control the concern if the veteran or service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

(c) *Control over a partnership.* In the case of a partnership, one or more veterans, or in the case of an SDVO SBC, service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must serve as general partners, with control over all partnership decisions.

(d) *Control over a limited liability company.* In the case of a limited liability company, one or more veterans, or in the case of an SDVO SBC, service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as management members, with control over all decisions of the limited liability company.

(e) *Control over a corporation.* One or more veterans, or in the case of an SDVO SBC, service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must control the Board of Directors of the concern.

(1) SBA will deem veteran or service-disabled veteran individuals to control the Board of Directors where:

(i) A single veteran or service-disabled veteran individual owns 100% of all voting stock of an Applicant or concern;

(ii) A single veteran or service-disabled veteran individual owns at least 51% of all voting stock of an Applicant or concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the veteran or service-disabled veteran individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or

(iii) More than one veteran, or in the case of an SDVO SBC, service-disabled veteran shareholder seeks to qualify the concern (*i.e.*, no one individual owns 51%), each

such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the veteran or service-disabled veteran shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the veteran or service-disabled veteran shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements. In the case of super majority ownership requirements where there is more than one eligible individual, the veteran or service-disabled veteran shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting.

(2) Where an Applicant or concern does not meet the requirements set forth in paragraph (e)(1) of this section, the veteran or service-disabled veteran individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (*e.g.*, in a concern having a two-person Board of Directors where one individual on the Board is a veteran or service-disabled veteran and one is not, the veteran or service-disabled veteran vote must be weighted - worth more than one vote - in order for the concern to be eligible). Where a concern seeks to comply with this paragraph (e)(2):

(i) Provisions for the establishment of a quorum cannot permit non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran Directors to control the Board of Directors, directly or indirectly; and

(ii) Any Executive Committee of Directors must be controlled by veteran or, in the case of an SDVO SBC, service-disabled veteran directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(3) Non-voting, advisory, or honorary Directors may be appointed without affecting veteran or service-disabled veteran individuals' control of the Board of Directors.

(4) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(f) *Super majority requirements.* One or more veteran or, in the case of an SDVO SBC, service-disabled veterans must meet all super majority voting requirements, regardless of legal structure of the Applicant firm. An Applicant must inform the SBA, when applicable, of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being certified, a Participant must inform the SBA of changes regarding super majority voting requirements.

(g) *Licenses.* A firm must obtain and keep current any and all required permits, licenses, and charters, required to operate the business.

(h) *Unexercised rights.* A veteran or, in the case of an SDVO SBC, service-disabled veteran owner's unexercised right to cause a change in the control or management of the Applicant concern does not in itself constitute control and management, regardless of how quickly or easily the right could be exercised.

(i) *Control by non-veterans or non-service-disabled veterans.* Non-veteran, or in the case of an SDVO SBC, non-service-disabled veteran individuals or entities may not control the firm. There is a rebuttable presumption that non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran individuals or entities control or have the power to control a firm in any of the following circumstances, which are illustrative only and not inclusive:

(1) The non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran individual or entity who is involved in the management or ownership of the firm

is a current or former employer or a principal of a current or former employer of any veteran, in the case of an SDVO SBC, service-disabled veteran individual upon whom the firm's eligibility is based. However, a firm may provide evidence to demonstrate that the relationship does not give the non-veteran or non-service-disabled veteran actual control over the concern and such relationship is in the best interests of the concern.

(2) One or more non-veterans or, in the case of an SDVO SBC, non-service-disabled veterans receive compensation from the firm in any form as directors, officers, or employees, including dividends, that exceeds the compensation to be received by the highest-ranking officer (usually CEO or President). The highest-ranking officer may elect to take a lower amount than the total compensation and distribution of profits that are received by a non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran only upon demonstrating that it helps the concern.

(3) In circumstances where the concern is co-located with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.

(4) In circumstances where the concern shares employees, resources, equipment, or any type of services, whether by oral or written agreement with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.

(5) A non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran individual or entity, having an equity interest in the concern, provides critical financial or bonding support.

(6) In circumstances where a critical license is held by a non-veteran or, in the case of an SDVO SBC, non-service-disabled individual, or other entity, the non-veteran

or non-service-disabled individual or entity may be found to control the firm. A critical license is considered any license that would normally be required of firms operating in the same field or industry, regardless of whether a specific license is required on a specific contract.

(7) Business relationships exist with non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran individuals or entities which cause such dependence that the Applicant or concern cannot exercise independent business judgment without great economic risk.

(j) *Critical financing.* A non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran individual or entity may be found to control the concern through loan arrangements with the concern or the veteran(s)/service-disabled veteran(s). Providing a loan or a loan guaranty on commercially reasonable terms does not, by itself, give a non-veteran or non-service-disabled veteran individual or entity the power to control a firm, but when taken into consideration with other factors may be used to find that a non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran firm or individual controls the concern.

(k) *Normal business hours.* There is a rebuttable presumption that a veteran or, in the case of an SDVO SBC, service-disabled veteran does not control the firm when the veteran or, in the case of an SDVO SBC, service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work. This may include, but is not limited to, other full-time or part-time employment, being a full-time or part-time student, or any other activity or obligation that prevents the veteran or, in the case of an SDVO SBC, service-disabled veteran from actively working for the firm during normal business operating hours.

(l) *Close proximity.* There is rebuttable presumption that a veteran or, in the case of an SDVO SBC, service-disabled veteran does not control the firm if that individual is

not located within a reasonable commute to firm's headquarters and/or job-sites locations, regardless of the firm's industry. The veteran or, in the case of an SDVO SBC, service-disabled veteran's ability to answer emails, communicate by telephone, or to communicate at a distance by other technological means, while delegating the responsibility of managing the concern to others is not by itself a reasonable rebuttal.

(m) *Exception for “extraordinary circumstances.”* SBA will not find that a lack of control exists where a veteran or, in the case of an SDVO SBC, service-disabled veteran does not have the unilateral power and authority to make decisions in “extraordinary circumstances.” The only circumstances in which the exception in this paragraph (m) applies are those articulated in the definition of the term in § 128.102.

(n) *Exception for active duty.* Notwithstanding the provisions of this section requiring a veteran or, in the case of an SDVO SBC, service-disabled veteran to control the daily business operations and long-term strategic planning of a concern, where a veteran or, in the case of an SDVO SBC, service-disabled veteran individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the veteran or, in the case of an SDVO SBC, service-disabled veteran during the period of active duty. The concern will not be considered ineligible based on the absence of the veteran or service-disabled veteran during the period of active duty. The concern must keep records evidencing the active duty and the written designation of control and provide those documents to SBA.

§ 128.204 What size standards apply to VO SBCs and SDVO SBCs?

(a) At time of contract offer, a VO or SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract.

(b) If the contracting officer is unable to verify that the VO or SDVO SBC is small, the concern shall be referred to the responsible SBA Government Contracting Area Director for a formal size determination in accordance with part 121 of this chapter.

Subpart C - Certification of VO SBC or SDVO SBC Status

§ 128.300 How is a concern certified as a VO SBC or SDVO SBC?

(a) A small business concern must be unconditionally owned and controlled by one or more eligible veterans, in the case of an SDVO SBC, service-disabled veterans or surviving spouses, have completed the online application forms, submitted required supplemental documentation to SBA, and have been examined by SBA.

(b) A certified Participant in SBA's 8(a) Business Development (BD) Program that is owned and controlled by one or more veterans, or in the case of SDVO SBC, service-disabled veterans. The eligible individual(s) for both designations must be the same individual(s) to receive expedited review.

(c) A certified Participant in SBA's Women Owned Small Business (WOSB) or Economically Disadvantaged WOSB (EDWOSB) Program that is owned and controlled by one or more veterans, or in the case of SDVO SBC, service-disabled veterans. The eligible individual(s) for both designations must be the same individual(s) to receive expedited review.

§ 128.301 Where must an application be filed?

An application for certification must be electronically filed in the database located on SBA's web portal. Guidelines and forms are located on the web portal. Upon receipt of the Applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information.

§ 128.302 How does SBA process applications for certification?

(a) SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or deny applications for certification. SBA will receive, review, and examine all certification applications.

(b) SBA, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. SBA will take into account any clarifications made by an Applicant in response to a request for such SBA.

(c) SBA, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial or administrative removal.

(d) An Applicant's eligibility will be based on the totality of circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section, additional documentation is submitted pursuant to paragraph (c) of this section, as provided in paragraph (e) of this section or in the case of amended documentation submitted pursuant to § 128.304(a). The Applicant bears the burden to establish its status as a VO SBC or SDVO SBC.

(e) Changed circumstances for an Applicant occurring subsequent to its application and which affect eligibility will be considered and may constitute grounds for denial of the application. The Applicant must inform SBA of any changed circumstances that could affect its eligibility for the program (e.g., ownership, control changes, or bankruptcy filing) during its application review and may withdraw their application at that time. The D/GC may propose decertification for any VO SBC or SDVO SBC that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) The decision of the D/GC to approve or deny an application will be in writing. A decision to deny certification status will state the specific reasons for denial and will inform the Applicant of any appeal rights.

(g) If the D/GC approves the application, the date of the approval letter is the date of Participant certification for purposes of determining the Participant's certification term of eligibility. For approvals contingent on reciprocity due to participation in SBA's other certification programs (e.g., WOSB or 8(a)), the approval letter will contain a date for the Vets Program certification which aligns with the remaining time in the other program(s) in which the Applicant is participating.

(h) The decision may be sent by mail, commercial carrier, or other electronic means. It is the responsibility of the Applicant to ensure all contact information is current in the Applicant's profile.

§ 128.303 What must a concern submit to apply for VO SBC or SDVO SBC certification?

(a) To be certified by SBA as a VO or SDVO SBC, a concern must provide documents and information demonstrating that it is owned and controlled by one or more veterans or, in the case of an SDVO SBC, service-disabled veterans and qualifies as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code under which it currently conducts business activities. SBA maintains a list of the minimum required documents that can be found on SBA's website. A concern may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of Federal personal and business tax returns as filed with the Internal Revenue Service, and individual and business banking information. From the time the Applicant submits the application, the Applicant must also retain on file, at the principal place of business, a complete copy of all supplemental documentation required by, and provided to, SBA for use in certification examinations.

(b) A small business concern that is certified by the 8(a) BD Program and the individual(s) on whom 8(a) BD Program eligibility is based is one or more veterans, or service-disabled veterans in the case of an SDVO SBC, may use documentation of its most recent annual review, or documentation of its 8(a) acceptance if it has not yet had an annual review, in support of its application for certification. An Applicant must certify that there are no material changes in its ownership or control since its 8(a) certification or annual review and demonstrate that the individuals who own and control it are veterans or, in the case of an SDVO SBC, service-disabled veterans.

(c) A small business concern that is certified by the WOSB/EDWOSB Program and the individual(s) on whom WOSB/EDWOSB Program eligibility is based is one or more veterans, or service-disabled veterans in the case of an SDVO SBC, may use documentation of its most recent annual recertification, or documentation of its acceptance in support of its application for certification. An Applicant must certify that there are no material changes in its ownership or control since its WOSB certification or recertification and demonstrate that the individuals who own and control it are veterans or, in the case of an SDVO SBC, service-disabled veterans.

(d) If a concern was decertified or previously denied certification within the past 3 years, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 128.307, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

§ 128.304 Can an Applicant appeal SBA's initial decision to deny an application?

(a) An Applicant may appeal SBA's decision to deny an application by filing an appeal with the SBA's Office of Hearings and Appeals (OHA) after the Applicant receives the denial in accordance with part 134 of this chapter. The filing party bears the risk that the delivery method chosen will not result in timely receipt by OHA.

(b) The decision may be sent by mail, commercial carrier, or other electronic means.

§ 128.305 Can an Applicant or Participant reapply for certification?

(a) Once an application, an appeal of a denial of an application, or an appeal of a certified status decertification has been denied, or a certified status decertification which was not appealed has been issued, the Applicant or Participant shall be required to wait for a period of 90 calendar days before a new application will be processed by SBA.

(b) Participants may recertify within 120 calendar days prior to the termination of their eligibility period. If a Participant is found to be ineligible, the Participant will forfeit any time remaining on their eligibility period and will be immediately removed from the certification database. An Applicant removed pursuant to this section may appeal the decision to OHA in accordance with § 128.304. The date of a new determination letter certifying an Applicant will be the beginning of the next 3-year eligibility period.

§ 128.306 What length of time may a business participate in SBA's Veterans Certification Program?

(a) A Participant receives an eligibility term of 3 years from the date of SBA's approval letter establishing certified status. There is no limitation on the number of times a business may recertify to continue eligibility past an initial 3-year term.

(b) The Participant must maintain its eligibility during its tenure and must inform SBA of any changes that may affect its eligibility within 30 calendar days in accordance with § 128.307.

(c) The eligibility term may be shortened by removal pursuant to § 128.201, recertification pursuant to § 128.305(b), failure to maintain certification pursuant to § 138.307, voluntary withdrawal by the Participant pursuant to § 128.309, decertification pursuant to § 128.310, or an adverse status protest pursuant to part 134 of this chapter.

(d) SBA may initiate a certification examination whenever it receives credible information concerning a Participant's eligibility as a VO or SDVO SBC. Upon its completion of the examination, SBA will issue a written decision regarding the continued eligibility status of the questioned Participant.

(1) If SBA finds that the Participant does not qualify as a VO or SDVO SBC, the procedures at § 128.310 will apply, except as provided in § 128.201.

(2) If SBA finds that the Participant continues to qualify as a VO or SDVO SBC, the original eligibility period remains in effect.

§ 128.307 What are a Participant's ongoing obligations to SBA?

Once certified, a VO SBC or SDVO SBC must notify SBA of any material changes that could affect its eligibility within 30 calendar days of any such change and attest to continued eligibility. Material changes include, but are not limited to, a change in the ownership, business structure, management, or bankruptcy. The notification must be in writing and must be uploaded into the concern's profile with SBA. The method for notifying SBA can be found on SBA's web page. A concern's failure to notify SBA of such a material change may result in a certification examination as described in § 128.308, and/or decertification and removal from the certification database for the program (or any successor system) as a designated certified VO SBC or SDVO SBC. In addition, SBA may seek the imposition of penalties under § 128.600.

§ 128.308 What is a certification examination and what will SBA examine?

(a) *General.* A certification examination is an investigation by SBA officials, which verifies the accuracy of any statement or information provided by a certified

Participant. Thus, examiners may verify that the Participant currently meets the eligibility requirements of this part, and that it met such requirements at the time of its application or its most recent size recertification. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a Participant no longer meets eligibility requirements in this part.

(b) *Scope of examination.* SBA may conduct the examination at one or all of the Participant's offices or work sites. SBA will determine the location(s) of the examination. SBA may review any information related to the concern's eligibility requirements under this part including, but not limited to, documentation related to the legal structure, ownership, and control. Examiners may review any or all of the organizing documents, financial documents, and publicly available information as well as any information identified in § 128.303.

§ 128.309 What are the ways a business may exit certification status?

A Participant may:

(a) Voluntarily decertify its status by submitting a written request to SBA requesting that the concern be removed from public listing in the certification database; or

(b) Delete its record entirely from the certification database; or

(c) SBA may remove a Participant immediately pursuant to § 128.201; or

(d) SBA may remove a Participant from public listing in the certification database for good cause upon formal notice to the Participant in accordance with § 128.310.

Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the Participant's application.

(2) Failure by the Participant to maintain its eligibility for program participation.

(3) Failure by the Participant for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, management, and control by veterans, service-disabled veterans, or surviving spouses.

(4) Failure by the concern to disclose to SBA the extent to which non-veteran or, in the case of an SDVO SBC, non-service-disabled veteran persons or firms participate in the management of the Participant.

(5) Failure to make required submissions or responses to SBA or its agents, including a failure to make available financial statements, requested tax returns, reports, information requested by SBA or SBA's Office of Inspector General, or other requested information or data within 30 calendar days of the date of request.

(6) Cessation of the Participant's business operations.

(7) Failure by the concern to provide SBA notification within 30 calendar days of any change in ownership.

(8) Failure to inform SBA of any such changed circumstances, as outlined in § 128.307.

(9) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(10) SBA will decertify a concern found to be ineligible during a status protest.

(e) The examples of good cause listed in paragraph (d) of this section are intended to be illustrative only. Other grounds for decertifying a Participant include any other cause of so serious or compelling a nature that it affects the present responsibility of the Participant.

§ 128.310 What are the procedures for decertification?

(a) *General.* When SBA believes that a Participant's certified status should be cancelled prior to the expiration of its eligibility term, SBA will notify the Participant in

writing. The Notice of Proposed Decertification Letter will set forth the specific facts and reasons for SBA's findings and will notify the Participant that it has 30 calendar days from the date SBA sent the notice to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification.

(b) *Recommendation and decision.* Following the 30-day response period, the D/GC will consider any information submitted by the Participant. Upon determining that decertification is not warranted, the D/GC will notify the Participant in writing. If decertification appears warranted, the D/GC will determine whether to cancel the Participant's certified status.

(c) *Notice requirements.* Upon deciding that decertification is warranted, the D/GC will issue a Notice of Certified Status Decertification. The Notice will set forth the specific facts and reasons for the decision and will advise the concern that it may re-apply after it has met all eligibility criteria in this part and completed the waiting period as set forth in § 128.305(a).

(d) *Effect of decertification.* After the effective date of decertification, a Participant is no longer eligible to appear as “certified” in the certification database. However, such concern is obligated to perform previously awarded contracts to the completion of their existing term of performance.

(e) *Appeals.* A Participant may file an appeal with OHA concerning the Notice of Certified Status Decertification decision in accordance with part 134 of this chapter. The decision on the appeal shall be final.

Subpart D - Federal Contract Assistance

§ 128.400 What are VO and SDVO contracts?

(a) For VA procurements, the VAAR specifically governs requirements exclusive to VA prime and subcontracting actions. The VAAR, 48 CFR chapter 8, supplements the

Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

(b) For all other SDVO contracts, including Multiple Award Contracts (*see* § 125.1 of this chapter), such are available to an SDVO SBC through any of the following procurement methods:

(1) Sole source awards to an SDVO SBC;

(2) Set-aside awards, including partial set-asides, based on competition restricted to SDVO SBCs;

(3) Awards based on a reserve for SDVO SBCs in a solicitation for a Multiple Award Contract (*see* § 125.1 of this chapter); or

(4) Orders set aside for SDVO SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

§ 128.401 What requirements must a VO SBC or SDVO SBC meet to submit an offer on a contract?

(a) *General.* (1) In order for a concern to submit an offer and be eligible for the award of a VO or SDVO set-aside or sole source contract, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code(s) assigned to the contract and be a certified VO SBC or SDVO SBC, or represent that it has submitted a complete application for VO SBC or SDVO SBC certification to SBA and has not received a negative eligibility determination regarding that application.

(2) If a concern is not certified by SBA at the time of offer, the concern must represent to the contracting officer for the particular contract that it has submitted a complete application to SBA for VO SBC or SDVO SBC certification.

(i) If a concern becomes the apparent successful offeror while its application for VO or SDVO SBC certification is pending, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's

VO or SDVO SBC application and make a determination regarding the firm's status within 15 calendar days from the date that SBA received the contracting officer's notification.

(ii) If the contracting officer does not receive an SBA determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible VO SBC or SDVO SBC and may award the subject contract accordingly to the next highest evaluated offeror, unless the contracting officer grants SBA an extension to the 15-day response period.

(b) *Joint ventures.* A business concern seeking a VO SBC or SDVO SBC contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in § 128.402.

(c) *Non-manufacturers.* A certified VO SBC or SDVO SBC which is a non-manufacturer may submit an offer on a VO or SDVO contract for supplies if it meets the requirements of the non-manufacturer rule set forth at § 121.406(b)(1) of this chapter.

(d) *Multiple Award Contracts--(1) VO or SDVO status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines VO or SDVO small business eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as a certified VO or SDVO small business concern as part of its initial offer (or other formal response to a solicitation), which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) *Unrestricted Multiple Award Contracts or set-aside Multiple Award Contracts for other than VO or SDVO.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for VO or SDVO small business concerns, if a business concern is a certified as a VO or SDVO small business concern at

the time of offer and contract-level recertification for the Multiple Award Contract, it is a VO or SDVO small business concern for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as a VO or SDVO small business for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for VO or SDVO small business concerns, a concern must recertify that it qualifies as a VO or SDVO small business concern at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which certified VO or SDVO small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the certified VO or SDVO small business pool, concerns need not recertify their status as VO or SDVO small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *VO or SDVO set-aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for a VO or SDVO small business concern, if a business concern is a VO or SDVO small business concern at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VO or SDVO small business concern for each order issued against the contract, unless a contracting officer requests recertification as a VO or SDVO small business concern for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine VO or SDVO small business status at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or an

Agreement issued against a Multiple Award Contract if the contracting officer requests a new VO or SDVO small business certification for the order or Agreement.

(2) *Total set-aside contracts.* The VO SBC or SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of a contract totally set aside for VO SBCs or SDVO SBCs. However, the contracting officer, in their discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial set-aside contracts.* For orders awarded under a partial set-aside contract, the VO SBC or SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, during each performance period of the contract (e.g., during the base term and then during each option period thereafter). For orders awarded under the non-set-aside portion, the VO SBC or SDVO SBC need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, the contracting officer, in their discretion, may require the concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Orders.* The VO SBC or SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of each individual order that has been set aside for VO SBCs or SDVO SBCs.

(5) *Reserves.* The VO SBC or SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of an order that is set aside for VO SBCs or SDVO SBCs. However, the VO SBC or

SDVO SBC will not have to comply with the limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst VO SBCs or SDVO SBCs and one or more other-than-small business concerns.

(e) *Recertification.* (1) A concern that qualifies as a VO SBC or SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered a VO SBC or SDVO SBC throughout the life of that contract. This means that if a VO SBC or SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered a VO SBC or SDVO SBC for each order issued against the contract, unless a contracting officer requests a new VO SBC or SDVO SBC eligibility review in connection with a specific order. Where a concern later fails to qualify as a VO SBC or SDVO SBC, the procuring agency may exercise options and still count the award as an award to a VO SBC or SDVO SBC. However, the following exceptions apply to this paragraph (e)(1):

(i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must recertify its status as a VO SBC or SDVO SBC to the procuring agency or inform the procuring agency that it does not qualify as a VO SBC or SDVO SBC within 30 days of the novation approval. If the concern is not a VO SBC or SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VO or SDVO goals.

(ii) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its VO SBC or SDVO SBC status to the procuring agency or inform the procuring agency that it no longer qualifies as a VO SBC or SDVO SBC. If the contractor is not a VO SBC or SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract from that

point forward towards its VO or SDVO goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been a VO SBC or SDVO SBC status protest on the solicitation or contract, *see* part 134 of this chapter for the effect of the status determination on the contract award.

(2) For the purposes of VO SBC or SDVO SBC contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its VO SBC or SDVO SBC status no more than 120 calendar days prior to the end of the fifth year of the contract, and no more than 120 calendar days prior to exercising any option. If the business is unable to recertify its VO or SDVO status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its VO or SDVO goals.

(3) A business concern that did not certify itself as a VO SBC or SDVO SBC, either initially or prior to an option being exercised, may recertify itself as a VO SBC or SDVO SBC for a subsequent option period if it meets the eligibility requirements in this part at that time.

(4) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting (*see* § 125.6 of this chapter), nonmanufacturer (*see* § 121.406(b) of this chapter), and subcontracting plan requirements (*see* § 125.3(a) of this chapter) in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

(f) *Limitations on subcontracting.* A business concern seeking a VO SBC or SDVO SBC requirement must also meet the applicable limitations on subcontracting requirements as set forth in § 125.6 of this chapter for the performance of VO SBC or SDVO SBC contracts (both sole source and those totally set aside for VO SBC or SDVO SBC), the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for VO SBC or SDVO SBC.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside or sole source service contract or order, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside or sole source service contract or order, the prime contractor is not eligible for award of a VO or SDVO contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, the issue in paragraph (g) introductory text may be grounds for a VO or SDVO status protest, as described in subpart E of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, the issue in paragraph (a) introductory text may be grounds for a size protest subject to the ostensible subcontractor rule, as described at § 121.103(h)(2) of this chapter.

(2) SBA will find that a prime VO or SDVO contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

§ 128.402 May a joint venture submit an offer on a VO SBC or SDVO SBC requirement?

(a) *Certification.* For VA contracts, a VO SBC or SDVO SBC joint venture must be certified to submit an offer on a VO SBC or SDVO SBC contract, as set forth in 48 CFR part 819. For all other SDVO SBC contracts, joint ventures may apply for certification. To be eligible for inclusion, a joint venture must demonstrate that:

(1) The underlying VO SBC or SDVO SBC upon which eligibility is based is certified in accordance with this part; and

(2) The joint venture agreement complies with the requirements set forth in this part.

(b) *General.* A VO SBC or SDVO SBC may enter into a joint venture agreement with one or more other SBCs or its SBA-approved mentor for the purpose of performing a VO or SDVO contract if the joint venture meets all of the following requirements:

(1) *Size of concerns to a VO or SDVO SBC joint venture.* (i) A joint venture of at least one certified VO SBC or SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive VO SBC or SDVO SBC procurement or sale, or be awarded a sole source VO or SDVO contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(ii) A joint venture between a protégé firm certified as a VO SBC or SDVO SBC and its SBA-approved mentor (*see* § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the VO or SDVO procurement or sale.

(2) *Contents of joint venture agreement.* Every joint venture agreement to perform a VO or SDVO contract, including those between a protégé firm certified as a VO SBC

or SDVO SBC and its SBA-approved mentor authorized by § 125.9 of this chapter, must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating a certified VO SBC or SDVO SBC as the managing venturer of the joint venture and designating a named employee of the certified VO SBC or SDVO SBC managing venturer as the manager with ultimate responsibility for performance of the contract (the “Responsible Manager”);

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary;

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified VO SBC or SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified VO SBC or SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified VO SBC or SDVO SBC for purposes of performance under the joint venture; and

(C) Although the joint venture managers responsible for orders issued under an indefinite delivery/indefinite quantity contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(iii) Stating that with respect to a separate legal entity joint venture, the certified VO SBC or SDVO SBC must own at least 51% of the joint venture entity;

(iv) Stating that the certified VO SBC or SDVO SBC must receive profits from the joint venture commensurate with the work performed by the certified VO SBC or

SDVO SBC, or a percentage agreed to by the parties to the joint venture whereby the certified VO SBC or SDVO SBC receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified VO or SDVO SBC;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a VO or SDVO contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VO or SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (b)(3) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of

the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the certified VO or SDVO small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of the VO or SDVO contract and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified VO SBC or SDVO SBC managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the certified VO SBC or SDVO SBC managing venturer upon completion of the VO or SDVO contract performed by the joint venture;

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 calendar days after completion of the contract.

(3) *Performance of work.* (i) For any VO or SDVO contract, including those between a protégé and a mentor authorized by § 125.9 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter.

(ii) The certified VO SBC or SDVO SBC partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(A) The work performed by the certified VO SBC or SDVO SBC partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(B) The amount of work done by the partners will be aggregated and the work done by the certified VO SBC or, in the case of an SDVO SBC, SDVO SBC partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-VO SBC or, in the case of an SDVO SBC, SDVO SBC partner, all work done by the non-VO SBC or, in the case of an SDVO SBC, SDVO SBC partner and any of its affiliates at any subcontracting tier will be counted.

(4) *Certification of compliance.* Prior to the performance of any VO or SDVO contract as a joint venture, the certified VO SBC or SDVO SBC partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (b)(2) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (b)(3) of this section.

(5) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a VO or SDVO contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the certified VO SBC

or SDVO SBC to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(6) *Contract execution.* The procuring activity will execute a VO or SDVO contract in the name of the joint venture entity or the certified VO SBC or SDVO SBC, but in either case will identify the award as one to a VO or SDVO joint venture or a VO or SDVO mentor-protégé joint venture, as appropriate.

(7) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(8) *Performance of work reports.* A certified VO SBC or SDVO SBC partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each VO or SDVO contract it performs as a joint venture.

(i) The certified VO SBC or SDVO SBC partner to the joint venture must annually submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(ii) At the completion of every VO or SDVO contract awarded to a joint venture, the certified VO SBC or SDVO SBC partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b)(2) of this section.

(iii) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

(9) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(i) Failure to enter a joint venture agreement that complies with paragraph (b)(2) of this section;

(ii) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (b)(3) of this section; or

(iii) Failure to submit the certification required by paragraph (b)(4) of this section or comply with paragraph (b)(7) of this section.

(10) *Limitation on offers from joint venture partners.* A VO SBC or SDVO SBC cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract set aside or reserved for VO SBCs or SDVO SBCs.

§ 128.403 What requirements are not available for VO or SDVO contracts?

For VA procurements, a contracting officer may award a VO or SDVO contract as set forth in the VAAR. For non-VA SDVO contracts, a contracting activity may not make a requirement available for a SDVO contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 8501 *et seq.*, as amended; or

(b) An 8(a) Participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a)

program, unless SBA has consented to release of the requirement from the section 8(a) program.

§ 128.404 When may a contracting officer set aside a procurement for VO SBCs or SDVO SBCs?

(a) *VA procurements.* For VA procurements, a contracting officer may set aside a contract for a VO SBC or SDVO SBC as set forth in the VAAR. For non-VA procurements, the contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to § 128.403.

(b) *Contracting among small business programs--(1) Acquisitions valued at or below the simplified acquisition threshold.* For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. The requirement in this paragraph (b)(1) does not preclude a contracting officer from making an award to a small business under the 8(a) BD, Historically Underutilized Business Zone (HUBZone), SDVO SBC, or WOSB Programs.

(2) *Acquisitions valued above the simplified acquisition threshold.* (i) For VA procurements, a contracting officer may award above the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be

obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC, or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC, or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.

(ii) SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(c) *SDVO SBC set-asides*. If the contracting officer decides to set aside the requirement for competition restricted to SDVO SBCs, the contracting officer must:

(1) Have a reasonable expectation that at least two responsible SDVO SBCs will submit offers; and

(2) Determine that the award can be made at fair market price.

(d) *Prohibition on combined set-asides*. A procuring activity cannot restrict an SDVO SBC competition (for either a contract or order) to require certifications other than SDVO SBC certification (i.e., a competition cannot be limited only to business concerns that are both SDVO SBC and 8(a), SDVO SBC and HUBZone, or SDVO SBC and WOSB).

§ 128.405 When may a contracting officer award sole source contracts to VO SBCs and SDVO SBCs?

For VA procurements, a contracting officer may award a sole source contract to a VO SBC or SDVO SBC as set forth in the VAAR. A contracting officer may award a sole source contract to an SDVO SBC for non-VA procurements only when the contracting officer determines that:

- (a) None of the provisions of § 128.403 or § 128.404 apply;
- (b) The anticipated award price of the contract, including options, will not exceed:
 - (1) \$7,000,000 for a contract assigned a manufacturing NAICS code; or
 - (2) \$4,000,000 for all other contracts;
- (c) A SDVO SBC is a responsible contractor able to perform the contract; and
- (d) Contract award can be made at a fair and reasonable price.

§ 128.406 Are there VO or SDVO contracting opportunities at or below the simplified acquisition threshold?

For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in 48 CFR part 819 of the VAAR. If the non-VA SDVO requirement is at or below the simplified acquisition threshold, the contracting officer may set aside the requirement for consideration among SDVO SBCs using simplified acquisition procedures or may award a sole source contract to an SDVO SBC.

§ 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as an SDVO contract?

The SBA Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVO sole source or a SDVO set-aside contract at or above the simplified acquisition threshold.

§ 128.408 What is the process for such an appeal?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVO contract, the contracting officer must notify the Procurement Center Representative as soon as practicable. If the SBA Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

Subpart E - Protests Concerning VO SBCs and SDVO SBCs

§ 128.500 What are the requirements for filing a VO SBC and SDVO SBC status protest?

(a) If an interested party challenges the inclusion in the database of a VO SBC or SDVO SBC based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration in accordance with part 134 of this chapter. The decision of the Office of Hearings and Appeals shall be considered final agency action.

(b) The protest procedures described in part 134 of this chapter are separate from those governing size protests and appeals. All protests relating to whether an eligible VO SBC or SDVO SBC is a “small” business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the VO SBC or SDVO SBC and whether the concern meets the VO SBC or SDVO SBC requirements set forth in § 128.200, SBA will process each protest concurrently under the procedures set forth in parts 121 and 134 of this chapter. SBA does not review issues concerning the administration of a VO or SDVO contract.

Subpart F - Penalties and Retention of Records

§ 128.600 What are the requirements for representing VO SBC or SDVO SBC status, and what are the penalties for misrepresentation?

(a) *Presumption of loss based on the total amount expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to VO SBCs or SDVO SBCs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a VO SBC or SDVO SBC willfully sought and received the award by misrepresentation.

(b) *Deemed certifications.* The following actions shall be deemed affirmative, willful, and intentional certifications of VO SBC or SDVO SBC status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to VO SBCs or SDVO SBCs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a VO SBC or SDVO SBC.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a VO SBC or SDVO SBC.

(c) *Signature requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the VO SBC or, in the case of an SDVO SBC, SDVO SBC status of a business concern seeking the Federal contract, subcontract, or grant. An authorized official must sign the certification on the same page containing the SDVO SBC status claimed by the concern.

(d) *Limitation of liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of VO SBC or SDVO SBC status was not affirmative, intentional, willful, or actionable under the False Claims Act, 31 U.S.C. 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' VO SBC or SDVO SBC status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing VO SBC or SDVO SBC status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where Government personnel have erroneously identified a concern as a VO SBC or SDVO SBC without any representation or certification having been made by the

concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for misrepresentation--(1) Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a VO SBC or SDVO SBC pursuant to the procedures set forth in 48 CFR part 9, subpart 9.4.

(2) *Civil penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws or regulations, including part 142 of this chapter.

(3) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the VO or SDVO SBC status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.

§ 128.601 What must a concern do in order to be identified as a SDVO SBC in any Federal procurement databases?

(a) In order to be identified as an SDVO SBC in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its SDVO SBC status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as a VO SBC or SDVO SBC in SAM fails to certify its status within one year of a status certification, the firm will not be listed as a VO SBC or

SDVO SBC in SAM, unless and until the firm recertifies its VO SBC or SDVO SBC status.

Subpart G - Surplus Personal Property for Veteran-Owned Small Business Programs

§ 128.700 How does a small business concern owned and controlled by veterans obtain Federal surplus personal property?

(a) *General.* (1) Pursuant to 15 U.S.C. 657b(g), eligible small business concerns owned and controlled by veterans may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102-37 and this section will be used to transfer surplus personal property to such concerns.

(2) The surplus personal property which may be transferred to SASPs for further transfer to eligible small business concerns owned and controlled by veterans includes all surplus personal property which has become available for donation pursuant to 41 CFR 102-37.30.

(b) *Eligibility to receive Federal surplus personal property.* To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

(1) Be a small business concern owned and controlled by veterans, that has been certified by SBA under this part;

(2) Not be debarred, suspended, or declared ineligible under title 2 or title 48 of the CFR; and

(3) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus personal property.* (1) Eligible concerns may acquire Federal surplus personal property from the SASP in the state(s) where the concern is located and operates, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus personal property is to be;

(ii) That it will use the surplus personal property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the surplus personal property to be acquired to any party other than the Federal Government as required by General Services Administration (GSA) and SASP requirements and guidelines;

(iv) That, at its own expense, it will return the surplus personal property to a SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the surplus personal property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give GSA and the SASP access to inspect the surplus personal property and all records pertaining to it.

(2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property, and all costs associated with the use and maintenance of the property.

(d) *Costs.* Concerns acquiring surplus personal property from a SASP may be required to pay a service fee to the SASP in accordance with 41 CFR 102-37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.

(e) *Title.* Upon execution of the SASP distribution document, the firm receiving the property has only conditional title to the property during the applicable period of restriction. Full title to the property will vest in the recipient concern only after the

recipient concern has met all of the requirements of this part and the requirements of GSA and the SASP that it received the property from.

Isabella Casillas Guzman,
Administrator.

[FR Doc. 2022-13563 Filed: 7/5/2022 8:45 am; Publication Date: 7/6/2022]